United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL WITH PROOF OF SERVICE

76-7315

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED MUTUAL LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

WILLIAM J. DAVENPORT, SALOMA DAVENPORT, his wife, WILLIAM WATTS, GRACE WATTS, "JOHN DOE", "RICHARD ROE", "JAMES POE", and "BILLY BOW", the names of the last four defendants being fictitious, true names being unknown to plaintiff, intending thereby to designate tenants or occupants of the mortgaged premises,

Defendants,

WILLIAM J. DAVENPORT,

Defendant-Appellant.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE

STATEMENT OF THE CASE

Nature of the Case

This is an action for foreclosure of a mortgage on real property lying and situate in the Bronx, New York. Plaintiff is the holder, obligee and mortgagee of a bond, as extended,

and mortgage given it by the defendants William J. Davenport and Saloma Davenport.

Course of Proceedings and Disposition of Case by District Court

The action was commenced in the Supreme Court of the State of New York, County of the Bronx, Index No. 14120/70 by service of the summons and complaint upon all defendants in August, 1970. Defendants Davenport, on or about September 24, 1970, caused the action to be removed to the United States District Court, Southern District of New York, based upon diversity of citizenship, the said defendants being citizens of the State of New Jersey. Plaintiff is a New York corporation.

The defendants Davenport obtained an order, filed October 28, 1970 (Document 3 of Appeal Record), which "assigned all future rents" to plaintiff, "to be used by plaintiff with management authority of receivership as required and in reduction of and abatement of its mortgage."

Defendants Davenport's motion to change venue was denied by Memo Endorsed dated January 27, 1971 (Document 4 of Appeal Record).

Defendants Davenport's motion to vacate the receivership was denied by Memo Endorsed dated June 30, 1971 (Document

11 of Appeal Record). Said defendants filed a "Motion Seeking an Accounting and Clarification of the Requirements of Receivership" on July 12, 1971 (Document 13 of Appeal Record). A Memo Endorsed required submission of a proposed Order as agreed upon, which was not done.

Plaintiff failed to appear upon a call of the Review Calendar on May 17, 1974. An Order was signed that day dismissing the action for failure to prosecute (Document 22 of Appeal Record). On or about May 18, 1974, said defendants filed a motion seeking an order dissolving the lien of the mortgage and releasing the defendants from the indebtedness (Document 21 of Appeal Record). It was based on their contention that plaintiff, as a court-appointed receiver, had received or was otherwise accountable for the rents from the subject premises in excess of the mortgage principal. The motion was granted in Opinion #40985, filed July 19, 1974 (Document 28 of Appeal Record).

Plaintiff filed its Motion to Reconsider on February 14, 1975 (Document 29 of Appeal Record). The Motion was granted by Opinion #42189, filed April 4, 1975, to the extent that an evidentiary hearing was to be held to determine the facts surrounding the collection and disposition of any rents by plaintiff

and their application in reduction of the mortgage (Document 31 of Appeal Record). The evidentiary hearing was held April 28, and May 1, 1975, and was merged into the trial of the action, conducted July 2, 1975 (Documents 43 and 46 of Appeal Record). Prior to trial and on or about May 16, 1975, defendant William J. Davenport filed a "Motion Seeking Reassignment Due to Apparent Prejudice By the Presiding Judge" (Document 33 of Appeal Record). The Motion was denied in open court on July 2, 1975.

Opinion #44084 was filed on March 17, 1976 granting judgment to plaintiff (Document 47 of Appeal Record). The Judgment, #76,466, was filed on May 20, 1976.

Statement of Facts

On or about June 17, 1964, the defendants Davenport executed and delivered a bond and mortgage to plaintiff (Trans. I, pp. 5-6)*. The obligation was extended by agreement dated May 5, 1969 (Trans. I, p. 42).

On or about February 15, 1970, defendants William J. and Saloma Davenport failed to tender payment or otherwise pay

*For convenience the transcript of the hearing held April 28 and May 1, 1975 shall be referred to as Trans. I throughout the brief and that of the trial Trans. II.

the monthly installment of principal and interest then due plaintiff-mortgagee. Such nonpayment continued for a period of time until plaintiff-mortgagee instituted an action in the Supreme Court of the State of New York, County of Bronx, to foreclose the subject mortgage (Trans. II, pp. 16-19; Trans. I, pp. 6-7).

Thereafter, defendants Davenport removed the case to the Southern District of New York and moved to have plaintiff-mortgagee appointed receiver. On or about the 28th day of October, 1970, the said defendants' motion was granted to the extent plaintiff-mortgagee was "assigned all future rents... to be used by plaintiff with management authority of receivership as required and in reduction of an abatement of its mortgage." (Document 3 of Appeal Record)

Winston D. Grace, Secretary-Treasurer of plaintiff-mortgagee, testified on direct and cross-examination that his employer did not undertake to collect the rents and profits from the mortgaged premises because of extensive and ongoing negotiations and attempts to reach an agreement with the said defendants whereby they would continue to collect rent and remit proceeds to the plaintiff-mortgagee (Trans. I, pp. 9-16, 36-38, 40-47, 49-55; Trans. II, p. 41). Mr. Grace also testified

that the extreme confusion created by the said defendants' multitudinous motions and proceedings operated to keep the plaintiff-mortgagee off balance. Also, it had not and has never been appointed or otherwise acted as a receiver at any time in its history.

Finally, on or about April 10, 1972, the plaintiff-mortgagee's good faith efforts resulted in an agreement, reduced to writing (plaintiff's Exhibit 3), between plaintiff-mortgagee and the defendants Davenport (Trans. I, pp. 17-19, 67-71). The latter have sworn they never signed the agreement, that their signatures are actually forgeries (Trans. II, pp. 68-9). A handwriting expert, Russel D. Osborn, testified at length that the signatures on the questioned document were certainly those of William J. and Soloma Davenport (Trans. I, pp. 75-91).

Notwithstanding their contention, the defendants agree that Mr. Davenport did collect the rents and profits from the subject premises commencing September, 1971 (Trans. II, pp. 57, 67). They never testified that he stopped collecting rent; only that he stopped making further payments to plaintiff-mortgagee in June, 1973 (Trans. II, p. 67). Mr. Davenport, on cross-examination, has admitted that no payments were made to

plaintiff-mortgagee subsequent to February, 1970 other than the amounts cited by Mr. Grace in his testimony, during 1972 and 1973 (Trans. II, p. 63). The defendants Davenport's sole defense at trial appears to be that of payment or partial payment in that plaintiff-mortgagee should have collected the rents and profits and applied same in reduction of the indebtedness.

The disbursements by plaintiff on behalf of the subject premises, the principal balance, and the amount due plaintiff after application of all sums received from the defendants Davenport were established at trial (Trans. II, pp. 19-22).

ARGUMENT

Point I

The Sole Action Properly Appealable and Before this Court Is United Mutual Life Insurance Company v. William J. Davenport, et al., 70 Civ. 3878.

Defendants' brief on page 10, paragraph 12, maintains that all issues in all of the actions therein set forth are included in the instant appeal.

F.R.A.P. §3 specifies that an appeal from a district court to a court of appeals shall be by a notice of appeal.

The only notice of appeal respecting the instant appeal filed and served by defendants is in United Mutual Life Insurance Company v. William J. Davenport, 70 Civ. 3878. No other notices of appeal have been served upon plaintiff.

Moreover, plaintiff is unaware of any decision, judgment or interlocutory order which is appealable in any of these actions. 28 USC §§1291, 1292.

Point II

Defendants Have Not Been Denied Due Process of Law by the Lower Court's Refusal to Entertain the "Federal Question" Proffered by Defendants.

Defendants maintain under their Point One, beginning at page 16 of their brief, that the basis for removal and federal jurisdiction was the presence of a federal question. The question of whether an action instituted in a state court is removable to the federal courts must be resolved on the basis of the contents of the complaint. The contents of the petition for removal are not controlling. Tennessee v. Union & Planters' Bank, 152 US 454, 14 S Ct 654, 38 L Ed 511 (1894); Minnesota v. Northern Securities Co., 194 US 48, 24 S Ct 598, 48 L Ed 870 (1904); Great Northern Ry. Co. v. Alexander (Hall's Admiral),

246 US 276, 38 S Ct 237, 62 L Ed 713 (1918); Gully v. First Nat. Bank in Meridian, 299 US 109, 57 S Ct 96, 81 L Ed 70 (1936)

A perusal of the complaint in this action reveals no matter arising under the Constitution, laws or treaties of the United States. 28 USC §1331. The complaint is simply one sounding in foreclosure; no federal question is raised.

The "federal question" which defendant seeks to raise is the unlawful exercise of its police power by the State of New York. (Appellant's brief, page 16, first paragraph.) On its face, it is by no stretch of the imagination raised by plaintiff's complaint.

Defendant refers throughout his brief and all the proceedings heretofore had to the abuse and injury he has suffered through the application of said State's rent control laws. He appears to contend that as a result he has been unable to collect rents and hence unable to pay plaintiff's mortgage. He would characterize this as the unlawful exercise of the said State's police power. Yet, even if this is so, it is irrelevant to whether or not plaintiff is entitled to judgment. The simple issue before the district court is whether the defendants have met their monetary obligation to plaintiff on the bond and

mortgage.

The basis for federal jurisdiction is diversity of citizenship: plaintiff is a New York citizen and the defendants Davenport are New Jersey citizens; the amount in controversy exceeds the sum or value of $10,000. 28 USC §1332. (Of course, the tenants named as defendants are not necessary parties in a foreclosure proceeding and so their citizenship is not relevant to the question of diversity.)

Point III

Denial of Defendants' Requests for Consolidation and Allowance of an Alleged Cross-Claim Is Not Reversible Error.

Defendants' Point Two appears to be an amalgam of the following contentions: a) that the District Court avoided the "federal question," already discussed under defendants' Point One and our Point II, b) that certain related actions should have been consolidated, and c) that defendants were entitled to cross-claim against their co-defendants.

We believe the absence of any federal question has been clearly established under Point II hereof, so that further comment is unnecessary.

Consolidation, of course, is discretionary: the Rule, as its predecessor, 22 USC §734, uses the word "may." F.R.C.P., Rule 42; Lewis v. Baltimore & L.R.R., 62 F. 218 (4th Cir. 1894). It follows that although reviewable on appeal from a final judgment, a lower court's ruling with regard to consolidation should not be disturbed except for abuse of that discretion.

Before consolidation may be had, the party seeking same must show that the actions sought to be consolidated are pending in the District Court and involve a common question of law or fact. F.R.C.P., Rule 42.

The cases which defendants feel should be consolidated, which defendants' brief mistakenly labels joinder, in their Point Two, are the actions listed on pages 10, 11 and 33 of their brief. Mr. Davenport has made no attempt to establish the required common question of law or fact, other than to recite over and over again that he has been the victim of the application of rent control laws by New York State and New York City.

Plaintiff submits that the only nexus among any of these actions or between them and the subject action is that Mr. Davenport is a party in all. This surely is not what the Congress or the Courts have in mind by "common question of law or fact."

The instant case is a simple mortgage foreclosure, the questions being whether the defendants Davenport met their obligation to the plaintiff-mortgagee, whether plaintiff is entitled to judgment and what the amount owing plaintiff is. The remaining actions are not at all concerned with these questions and, from what can be discerned from defendants' brief, revolve around questions pertaining to rent charged by defendants Davenport to the tenants at the subject premises. The last action cited on page 11 of defendants' brief is an action for damages against an officer of plaintiff and a former member of the law firm representing plaintiff alleging, "perpetration of fraud."

Nor does defendant offer to show any other factors which might suggest the feasibility of consolidation, such as the reduction or saving of court costs, the avoidance of unnecessary delay and the avoidance of inconsistent results.

On page 24, defendants assert that the actions were assigned to different judges "contrary to the rules of these courts" and that their "enjoinment" (sic) "would have been consistent with the rules of the court and mandatory to Fair Trial and Due Process of Law." No rules are cited. And, of course, consolidation, as previously discussed, is discretionary.

In short, defendants have failed to show an abuse of discretion by the District Court in denying consolidation.

Defendants have never filed and served any pleading containing a cross-claim. F.R.C.P., Rules 7, 8 and 10. A copy of their original answer is annexed hereto as Exhibit A. It does not contain a cross-claim. The record does not reveal an amended answer, which could possibly contain a cross-claim.

The defendants Davenport's proposed cross-claim would apparently have involved a demand for return of moneys obtained by co-defendants William and Grace Watts through garnishment and possibly other proceedings. They were tenants of the mortgaged premises and had recouped or attempted to recoup excessive rents charged by the Davenports.

This is hardly the situation contemplated in F.R.C.P., Rule 13 (g), which requires that the cross-claim must arise out of the transaction or occurrence that is the subject matter of the original action. Whether defendants are entitled to the relief requested against the said tenants is not logically related to whether the plaintiff is entitled to foreclosure of its mortgage.

The clause added in 1946--the last 14 words of the subdivision--would be inapplicable. The Advisory Committee's

Note of 1946 to Amended Subdivision (9) recites:

> The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13 (g).
>
> 3 Moore's Federal Practice, ¶13.01[7]

Even this liberalization assumes a situation much more connected than defendants'.

Another potential obstacle to the proposed cross-claim is that unless ancillary jurisdiction is invoked, the cross-claim's assertion might destroy the present diversity of citizenship, necessitating a remand to the state courts. Defendants Davenport have removed on the basis that these co-defendants are not necessary parties and hence their New York citizenship is irrelevant.

Point IV

Defendants' Affidavit of Bias Is Insufficient; the District Judge Was Not Biased or Prejudiced against Defendants or in Favor of Plaintiffs.

Defendants' brief, particularly under its Point Three and under its Motion Seeking Reassignment (Document 33 of Appeal

Record), posits as the basis for the averment of bias and prejudice against them and in favor of plaintiffs:

a) that the district judge is socially acquainted with "members" of plaintiff and plaintiff's attorneys (¶3 of Document 33);

b) unfavorable rulings for defendants; favorable rulings for plaintiff (the balance of Document 33, Point Three of brief);

c) that the district judge was involved in fixing a case (Point Three and Prior Statement, in brief; Defendant's Statement to Court July 1, 1975--Document 40 of Appeal Record).

Although these charges are ludicrous, without basis and undeserving of response, plaintiff shall briefly address them.

Whenever a party files a timely and sufficient affidavit that the presiding judge has a personal bias or prejudice against the party or in favor of an adverse party, another judge must be assigned to hear the proceeding. 28 USC §144.

To the extent the affidavit of bias is based on a general allegation of acquaintance of the judge with persons whom defendant opposes, it is insufficient. Duncan v. U.S., 48 F2d 128 (9th Cir. 1931); Morse v. Lewis, 54 F2d 1027 (4th Cir. 1932).

The bias or prejudice must be personal and extrajudicial. An affidavit basing its allegation of bias or prejudice on the judge's interpretation of the law or on prior adverse rulings is insufficient. United States v. Roca-Alvarez, 451 F2d 843 (5th Cir. 1971); Brown v. Wilson, 363 F Supp. 707 (Pa. 1973); Minnesota & Ontario Paper Co. v. Molyneaux, 70 F2d 545 (8th Cir. 1934).

With regard to the alleged overheard conversation between the district judge and the unidentified male, assuming arguendo that it in fact transpired, defendants Davenport have failed to directly relate its substance to anything having to do with the subject suit or to connect it with personal bias on the judge's part. The purported conversation is vague and innocuous at best. In re Lisman, 89 F2d 898 (2d Cir. 1937); Grimes v. U.S., 396 F2d 331 (9th Cir. 1968); Foster v. Medina, 170 F2d 632 (2d Cir. 1948); Wapnick v. U.S., 311 F Supp 183, Aff'd 423 F2d 1361 (N.Y. 1969).

In any event, the July 1, 1975 statement (Document 40 of Appeal Record) need not be considered as it was untimely, not having been filed at least ten days before the trial. Defendants have failed to show good cause for late filing, especially where William J. Davenport claims the conversation

occurred July, 1974. 28 USC §144.

Defendants' excerpts from the transcripts of the proceedings are wholly lacking in any proof of bias or prejudice on the part of the district judge. Most often their choice of quotations simply demonstrate their lack of understanding of legal proceedings. Generally they are out of context.

A perusal of the transcripts will evidence an extreme amount of patience on the part of the district judge in the face of the confusion engendered by Mr. Davenport's actions and statements. He repeatedly explained the purpose of the proceedings--to gather facts--and repeatedly had to request Mr. Davenport to refrain from simply making statements and arguing.

Point V

Sufficient Consideration Was Given to the Question of Plaintiff's Performance as Receiver.

Defendants' Point Four contends that plaintiff's performance as "receiver" was not adequately or properly examined below. The Davenports' position at trial was that the amount owing plaintiff should be set off by the amount of rents which supposedly should have been collected by plaintiff as receiver.

The transcripts belie defendants' contention. There was extensive examination and cross-examination of plaintiff's Winston D. Grace, a substantial portion of which concerned just that question. Apparently the lower court's unfavorable ruling on the question of plaintiff's performance as receiver is, for the defendants, ipso facto proof of lack of proper examination of that question.

Without belaboring the point, the Order of October 28, 1970 leaves much to be desired in clearly designating plaintiff a receiver (Document 3 of Appeal Record). With respect to establishing a receivership, it appears permissive rather than mandatory. It is perhaps more correctly construed as a judicial assignment of rents, or in the words of the Order, "all future rents." "Management authority of receivership" is to be used only "as required." An order the purpose of which is to appoint a receiver is always much more explicit and detailed as to the appointee's duties, responsibilities and powers. A receiver's bond is normally required to be posted. A direction as to what bank is to be the depository bank for rents received is normal.

But even if plaintiff is to be held to the standard of duty of a receiver, defendants have failed to show that the amount owing the plaintiff should be reduced in relation to

rents which were not collected by it. (Defendants have even failed to offer any proof of the amount of uncollected rents to be surcharged against plaintiff.)

A receiver appointed in any cause pending in any court of the United States shall manage and operate the property in his possession as such receiver according to the law of the State in which the property is situated, in the same manner that the owner would be bound to do if in possession thereof. 28 USC §959(b).

The principal duty of a receiver is to preserve and protect the property in its possession. It cannot be denied that plaintiff-mortgagee, as receiver, fulfilled this duty in view of the testimony at trial concerning its expenditures on behalf of the property through December, 1973, a point in time when it had already advanced $3,473.25 of its own funds for preservation and protection of the subject premises (Trans. II, pp. 19-22).

It is clear that in the State of New York, a receiver will not be held responsible or liable for rents not collected unless such non-collection is attributable to the receiver's fraud or willful neglect or willful default in its duties. Hubbell v. Moulson, 53 NY 225, 229 (1873); Morris v. Budlong,

78 NY 543, 557 (1879). To the extent the returns from receivership property show a loss, the receiver is responsible therefore only if his mismanagement is proved. Utica Partition Corporation v. Jackson Construction Company, 201 AD 376, 381 (1922).

The defendants Davenport have offered no proof of any fraud, neglect and default, willful or otherwise, nor mismanagement on the part of plaintiff-mortgagee. On the contrary, there was extensive testimony at trial of the plaintiff-mortgagee's good faith efforts to reach a mutually satisfactory arrangement for the management of the property, which efforts finally reached fruition in April, 1972.

Moreover, as Mr. Davenport has previously admitted, there were grave difficulties in the operation of the property long before the receiver was appointed. His posture at trial was that his inability to meet his obligation resulted directly from various rent control proceedings. Although the reason for his inability is not relevant in this foreclosure action, it raises a serious question and additional barrier to holding the receiver responsible for allegedly uncollected rents.

On or about October 8, 1971, approximately one year after the appointment of the receiver, which the defendants Davenport, not plaintiff, sought, he states in paragraph 7 of

his document entitled "Statement to the Court October 8, 1971 of Conditions of the Receivership" (annexed hereto as Exhibit B): For years and today, therefore tenants have refused to pay due rents, causing deterioration of the premises and services." (Emphasis added.) In paragraph 9 thereof, he complains about deterioration of services for lack of funds, of further reduced rents. He asserts in paragraph 10 that no tenant pays the agreed rent, that only two have paid him anything at all and that three apartments are occupied by squatters.

The question presenting itself is whether the defendants Davenport, aware of the building's deterioration and serious problems with the collection of rent, sought to place the burden on the plaintiff-mortgagee by having it appointed receiver, realizing that rent was uncollectible but hoping to hold the receiver responsible for such uncollectibility. The comment and holding of the court in Grifco v. Swartz, 61 Misc.2d 504, 514 (1969) is germane:

> There is no question but that when the property was turned over to the receiver, it was already run-down. Indeed, it was for this very reason that the plaintiffs made an application for the appointment of a receiver. Further, there is no doubt but that the property was incapable of supporting itself from the rental income and the receiver should not be placed in the position of assuming a personal financial burden which the defendant was either unwilling or unable to carry.

Point VI

The District Court's Findings of Fact May Not Be Set Aside.

Findings of fact shall not be set aside unless clearly erroneous. F.R.C.P., Rule 52(a). A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. United States Gypsum Co., 333 US 364, 394-5, 68 S Ct 525, 92 L Ed 746 (1948); Esso Standard Oil Co. v. The S.S. Kaposia, 259 F2d 486 (1958).

The transcripts of the proceedings do not reveal any error, much less reversible error, on the part of the lower court.

CONCLUSION

There is no reversible error; decision and judgment should stand in all respects.

Dated: New York, New York
September 28, 1976

Respectfully submitted,

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Attorneys for Plaintiff-Appellee

Loan & Trust Co. v. East & West R. Co., (CC-Ga), 40 Fed 182.

If new judge had qualified and assumed duties of office, acts of old judge thereafter were not official and legal. (1891) U. S. v. Alexander, (DC-Idaho), 46 Fed 728.

The section was remedial and applied to both civil and criminal cases. (1897) U. S. v. Murphy, (DC-Del), 82 Fed 893.

Section included process of which the object had not been fully accomplished, and included also, imprisonment under a commitment by a commissioner to answer a criminal charge. (1897) U. S. v. Murphy, (DC-Del), 82 Fed 893.

Where judge to whom case was submitted on motion of both parties for directed verdict died and another judge was designated to hold court, decision of designated judge had same force decision of other judge would have had. (1922) Thomas-Bonner Co. v. Hooven, Owens & Rentschler Co., (CCA 6), 284 Fed 386, aff'g 284 Fed 377.

144. Bias or prejudice of judge.—Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. ~~(June 25, 1948, c. 646, § 1, 62 Stat. 898; May 24, 1949, c. 139, § 65, 63 Stat. 99.)~~

Prior law.—This section is based on Act Mar. 3, 1911, c. 231, § 21, 36 Stat. 1090 (§ 25 of former Title 28).

Explanatory note.—The bracketed word "session" is inserted in view of the provisions of § 138 of this title, which abolished formal terms.

Revision note.—The provision that the same procedure shall be had when the presiding judge disqualifies himself was omitted as unnecessary. Words, "at which the proceeding is to be heard," were added to clarify the meaning of words, "before the beginning of the term." (See U. S. v. Costea, (DC-Mich), 52 FSupp 3.)

Amendment note.—Act May 24, 1949, cited to text, substituted "in any case" for "as to any judge" in the second paragraph.

Cross references.—Judge disqualifying himself, see § 455 of this title.

Transfer of criminal case for prejudice in the district or division, see Rule 21, Rules of Criminal Procedure for district courts.

NOTES TO DECISIONS

ANALYSIS

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8. —Certificate of good faith.
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1. In general.

Suggestion to judge by letter handed to him at chambers after trial that he withdraw from trial on account of bias was a contempt. (1925) Cooke v. U. S., 267 US 517, 69 LEd 767, 45 SCR 390, rev'g (CCA 5), 295 Fed 292.

In district having several judges, it was not necessary that all be disqualified in order to authorize designation from another district. (1919) In re De Ran, (CCA 6), 260 Fed 732.

Irregular affidavit, filed out of time and for purpose of delay, did not disqualify judge and was stricken from record. (1921) Anderson Coal Co. v. Waban Rosi Conservatories, (DC-Mass), 278 Fed 945.

Affidavit of prejudice affected power of judge to proceed further but did not divest court of jurisdiction. (1935) Carroll v. Zerbst, (CCA 10), 76 F(2d) 961.

Judge was not required to try attorney for contempt in advising clients that interrogatories of grand jurors about evidence on which they returned indictments against clients were proper when judge was confronted with affidavits of clients of bias and prejudice with certificates of their good faith appended by attorneys. (1940) Schmidt v. U. S., (CCA 6), 115 F(2d) 394.

The section was strictly construed. (1944) Skirvin v. Mesta, (CCA 10), 141 F(2d) 668; (1943) U. S. v. 16,000 Acres of Land, (DC-Kan), 49 FSupp 645; (1943) Burall v. Johnston, (DC-Cal), 53 FSupp 126. Aff'd 146 F(2d) 230.

Suggestion that sentencing judge should have disqualified himself upon the hearing of defendant's motion to vacate and correct sentence and that the hearing should have been before some other judge was without merit where there was no charge of prejudice and no dispute in regard to any material fact. (1945) Oxman v. U. S., (CCA 8), 148 F(2d) 750, 159 ALR 155.

Only questions of law are presented by a judge's refusal to disqualify himself. (1958) Green v. Murphy, (CA 3), 259 F(2d) 591.

Judge will abandon trust reposed in him only at sovereign's command or when he fails at his post. (1937) U. S. v. Buck, (DC-Mo), 18 FSupp 827.

Although the statute was interpreted liberally it could not be used frivolously. (1948) Allen v. duPont, (DC-Del), 75 FSupp 546.

Attorney who had filed motion and affidavit for change of judge on grounds of prejudice, accompanied by attorney's certificate of good faith, and decided before the hearing on the motion that the affidavit was improvident, should have withdrawn the motion, and his failure to do so might subject him to disciplinary action. (1956) Denis v. Perfect Parts, Inc., (DC-Mass), 142 FSupp 263, 109 USPQ 410.

2. Purpose and scope.

The section did not apply to appellate tribunals. (1914) Kinney v. Plymouth Rock

Prior law.—This section is based on Act Mar. 3, 1911, c. 231, §§ 273, 274, 36 Stat. 1164 (§§ 395 and 396 of former Title 28).

Revision note.—Section consolidates parts of sections cited. The remainder, relating to United States marshals and their deputies, is incorporated in § 556 of this title. The revised section has been extended to include all clerks, deputies, and assistants and substitutes as simpler and more appropriate, the prohibition against practice of law "in any court of the United States." For explanation of provisions omitted from said §§ 395 and 396 see note under § 556 of this title.

956. Powers and duties of clerks and deputies.—The clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court. (June 25, 1948, c. 646, § 1, 62 Stat. 926.)

Prior law.—This section is based on Act Mar. 3, 1911, c. 231, §§ 124, 139, 191, 192, 36 Stat. 1132, 1136, 1144; June 16, 1930, c. 494, 46 Stat. 589 (§§ 221, 244, 304, and 305 of former Title 28).

Revision note.—This section contains only a part of sections cited. The other provisions of such sections are incorporated in §§ 604, 711, 831, 833, 834, 957 and 1926 of this title. The phrase "assigned to them by the court" was substituted for the indefinite provision of said § 221 that the clerk of each circuit court of appeals "shall exercise the same powers and perform the same duties * * * as are exercised and performed by the clerk of the Supreme Court, so far as the same may be applicable." This section is new insofar as it affects the Clerk of the Supreme Court and clerks of the district courts and the Customs Court. Existing law does not prescribe the powers and duties of those clerks. The duties of the clerk of the Customs Court have been prescribed by the rules of such court adopted May 29, 1936.

Cross references.—Alaska, duties of clerks, see § 106 of Title 48.

Virgin Islands, duties of court officers, see § 1405y of Title 48.

957. Clerks ineligible for certain offices.—(a) A clerk of a district court or any of his deputies shall not be appointed a commissioner, master, referee or receiver in any case, unless there are special reasons requiring such appointment which are recited in the order of appointment.

(b) The clerk or assistant clerks of the Court of Customs and Patent Appeals shall not be appointed a commissioner, master or referee in any case. (June 25, 1948, c. 646, § 1, 62 Stat. 926.)

Prior law.—This section is based on Act Mar. 3, 1911, c. 231, §§ 68, 191, 36 Stat. 1105, 1144 (§§ 127 and 394 of former Title 28).

Revision note.—Provisions of said § 304 relating to appointment, powers, duties, and compensation of the clerk of the Court of Customs and Patent Appeals, and table of fees are incorporated in §§ 604, 831, 956 and 1926 of this title. The words "commissioner" and "referee" did not appear in said § 127. They were added to subsec. (a) to remove possible ambiguity. Words "by the court or any judge thereof" in said § 304, were omitted as surplusage. Words "or assistant clerks" and "in any case" were added in subsec. (b) to make the section applicable to that officer and consistent with the prohibition in this section against deputies of district court clerks.

Cross reference.—Appointment and compensation of masters for district courts, see Rule 53(a), Federal Rules of Civil Procedure.

NOTES TO DECISIONS

The irregularity of omitting to state the "special reason" in the decree could be corrected by an amendment of the decree nunc pro tunc. (1884) Fischer v. Hayes, (CC-NY), 22 Fed 92; (1903) Briggs v. Neal, (CCA 4), 120 Fed 224, rev'g 110 Fed 477; (1907) Quinton v. Neville, (CCA 8), 154 Fed 432.

A person appointed without assignment of a "special reason" was a de facto officer whose acts were valid as to third persons. (1897) Northwestern Mut. Life Ins. Co. v. Seaman, (CC-Neb), 80 Fed 357. Aff'd 86 Fed 493.

Omission of court to state special reason in order was not reversible error, when special reason was shown in his opinion. (1903) Briggs v. Neal, (CCA 4), 120 Fed 224, rev'g 110 Fed 477.

958. Persons ineligible as receivers.—A person holding any civil or military office or employment under the United States or employed by any justice or judge of the United States shall not at the same time be appointed a receiver in any case in any court of the United States. (June 25, 1948, c. 646, § 1, 62 Stat. 926.)

Prior law.—This section is based on Act May 28, 1896, c. 252, § 20, 29 Stat. 184; Dec. 28, 1945, c. 592, 59 Stat. 659 (§ 527 of former Title 28).

Revision note.—Provisions relating to ineligibility of various persons as United States commissioner appear as § 631 of this title. Words "janitor of any Government building" were omitted as covered by words "person holding any civil or military employment under the United States" used in the revised section. The general language of the revised section was substituted for the provisions enumerating certain officers and employees. The exception of Alaska by reference to "section 591 of this title" was omitted as surplusage. Alaska is excluded by reason of the words "any court of the United States" which are limited by definitive § 451 of this title.

959. Trustees and receivers suable—Management—State laws.—(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager accord-

ing to the requirements of the vaild laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. (June 25, 1948, c. 646, § 1, 62 Stat. 928.)

Prior law.—This section is based on Act Mar. 3, 1911, c. 231, §§ 65, 66, 36 Stat. 1104 (§§ 124 and 125 of former Title 28).

Revision note.—The criminal penalty for violation of said § 124 is incorporated in § 1911 of revised Title 18. Section was extended and made applicable to trustees and debtors in possession. The provision at the end of subsec. (a) for preserving the right to a jury trial was added to clarify the intent of said § 125 as construed in (1895) Vany v. Receiver of Toledo, St. L. & K. C. R. R. Co., (CC-Ohio), 67 Fed 379.

Cross references.—Mismanagement of property by receiver, criminal penalty, see § 1911 of Title 18.

Process and orders affecting property in different districts, see § 1692 of this title.

Receivers of property in different districts, jurisdiction, see § 754 of this title.

NOTES TO DECISIONS

ANALYSIS

1. In general.

The section was limited to actions against receivers which grew out of acts and transactions in respect to carrying on the business. (1894) Central Trust Co. v. East Tennessee, V. & G. Ry. Co., (CC-Ky), 59 Fed 523.

The section applied to receivers appointed in bankruptcy proceedings as well as other federal receivers. (1900) In re T. L. Kelly Dry-Goods Co., (DC-Wis), 102 Fed 747; (1903) In re Kanter, (CCA 2), 121 Fed 984; (1908) In re Smith, (DC-NY), 121 Fed 1014; (1908) In re Kalb & Berger Mfg. Co., (CCA 2), 165 Fed 895.

A receiver's power was only coextensive with that of court which gave him character. (1918) Primos Chemical Co. v. Fulton Steel Corp., (DC-NY), 254 Fed 454.

Purpose of act was to permit suits against receivers in local courts. (1926) Slover v. Chicago, M. & St. P. Ry. Co., (DC-Mo), 16 F(2d) 609.

A receiver was under no obligation to employ an attorney who brought about his appointment. (1934) Smith v. Morris, (CCA 3), 69 F(2d) 3.

The sole purpose was to make federal receivers amenable to suit without permission of the appointing court. (1943) Barber v. Powell, (CCA 4), 135 F(2d) 728, aff'g 222 NC 133, 22 SE(2d) 214.

While a court of equity could make summary orders against its own receiver it could not make summary orders against parties to the proceeding where there was no valid appointment of a receiver. (1932) In re Interborough-Manhattan Receivership, (DC-NY), 1 FSupp 828.

Receivers of a corporation represented the stockholders as well as the creditors. (1934) Greenbaum v. Lehrenkrauss, (DC-NY), 9 FSupp 425.

Receivers had the duty, through their attorneys, to maintain their status. (1934) In re Paramount-Publix Corp., (DC-NY), 10 FSupp 504, 29 AmB(NS) 254.

There was no difference between a receiver in bankruptcy and a trustee in bankruptcy. (1935) In re James Butler Grocery Co., (DC-NY), 12 FSupp 851; (1945) Robinson v. Trustees of New York, N. H. & H. R. Co., 318 Mass 121, 60 NE(2d) 593.

Primary duty of receiver was to the court and creditors. (1935) Art Print Shop Inc. v. Freidberger-Aron Mfg. Co., (DC-Pa), 14 FSupp 120. Aff'd 82 F(2d) 1010.

This section was applicable to a debtor in possession under § 207 of Title 11. (1941) Kennison v. Philadelphia & Reading Coal & Iron Co., (DC-Minn), 38 FSupp 980.

2. Suits against receivers generally.

Suits against a receiver are in effect only against the receivership, he being regarded as in the nature of a corporate sole. Such suits are against the funds in his hands. His contracts, misfeasances, and negligences are official, not personal, judgments against him are payable only from the property or money in his hands, and his discharge as receiver absolutely puts an end to his liability. (1891) McNulta v. Lochridge, 141 US 327, 35 LEd 796, 12 SCR 11, aff'g 137 Ill 270, 27 NE 452; (1894) Texas & Pacific Railway Co. v. Johnson, 151 US 81, 38 LEd 81, 14 SCR 250, aff'g 76 Tex 421, 13 SW 463, 18 AmSt 60; (1907) Gray v. Grand Trunk Western Ry. Co., (CCA 7), 156 Fed 736; (1909) Hanlon v. Smith, (CC-Iowa), 175 Fed 192; (1912) Smith v. Jones Lumber & Mercantile Co., (DC-Wis), 200 Fed 647.

Local statute regulating service of process against railway corporation was applicable to actions against the receiver of such corporation. (1896) Eddy v. Lafayette, 163 US 456, 41 LEd 225, 16 SCR 1082, aff'g (CCA 8), 49 Fed 807.

Section was intended to place receivers on same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of service. (1896) Eddy v. Lafayette, 163 US 456, 41 LEd 225, 16 SCR 1082, aff'g (CCA 8), 49 Fed 807; (1897) Peirce v. VanDusen, (CCA 6), 78 Fed 693, 69 LRA 705; (1916) Lamb v. Whitman, 17 GaApp 687, 87 SE 1095.

of Puerto Rico. (1914) Calaf y Fugurul v. Calaf y Rivera, 232 US 371, 58 LEd 642, 34 SCR 411, aff'g 17 Porto Rico 185.

The Supreme Court of the United States is generally unwilling to overrule decisions of the supreme court of Puerto Rico which have become established as local law. (1914) Nadal v. May, 233 US 447, 58 LEd 1040, 34 SCR 611.

Review by the Supreme Court of appeals from supreme court of Puerto Rico, was extended so as to include questions of fact. (1915) De Elzaburu v. Chaves, 239 US 283, 60 LEd 290, 36 SCR 47, aff'g 19 Porto Rico 162.

Determination of the district court and the Supreme Court of Puerto Rico as to the construction and application of the local law would not be disturbed by the court of appeals unless clearly wrong. (1927) Stubee v. Cordova, (CCA 1), 23 F(2d) 257; (1928) Boerman v. Marrero, (CCA 1), 27 F(2d) 321; (1929) Villar & Co., Inc. v. Conde, (CCA 1), 30 F(2d) 588; (1931) Cabo Rodriguez v. Anaud, (CCA 1), 54 F(2d) 585; (1932) Yabusoa Sugar Co. v. United Porto Rican Bank, (CCA 1), 59 F(2d) 492; (1933) Heirs of Franceschi v. Gonzalez, (CCA 1), 62 F(2d) 748; (1934) Domenech v. Verges, (CCA 1), 69 F(2d) 714; (1943) Monllor & Boscio v. Sancho, (CCA 1), 136 F(2d) 114; (1943) De Castro v. Board of San Juan Comrs., (CCA 1), 136 F(2d) 419. Aff'd-322 US 451, 88 LEd 1384, 64 SCR 1121.

Denial of speedy trial as required by the Organic Act of Puerto Rico [48 § 737] presented a substantial federal question supporting appeal. (1928) Gerardino v. Porto Rico, (CCA 1), 29 F(2d) 517.

Interpretation of territorial statute relating to elections which did not render the statute violative of the Organic Act [48 § 731 et seq.] presented a purely local question which would not be considered by the appellate court. (1932) Barcelo v. Saldana, (CCA 1), 54 F(2d) 852.

It was not enough that federal question be lurking in record. (1940) Ramos v. Leahy, (CCA 1), 111 F(2d) 955.

Mandamus proceeding to compel payment of salary to member of industrial commission of Puerto Rico involving contention that his salary had been reduced in contravention of provisions of the Organic Act presented a federal question. (1944) Fitzsimmons v. Leon, (CCA 1), 141 F(2d) 886.

The Supreme Court of Puerto Rico was entitled to the same degree of finality in its construction of a local tax statute as in any other question of local law. (1944) Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico, (CCA 1), 142 F(2d) 11.

The Supreme Court of Puerto Rico decided a question of purely local law when it interpreted the insular statute implementing provisions of the Organic Act restricting corporate ownership of land. (1946) Campose v. Central Cambalache, Inc., (CCA 1), 157 F(2d) 43.

Failure by Appellant to present alleged federal question to supreme court of Puerto Rico, although such question could have, and should have been, there presented then cannot be raised by appellant on appeal to give appellate jurisdiction to the first court of appeals. (1955) Mario Mercado E Hijos v. Lluberas Pasarell, (CA 1), 225 F(2d) 715.

A judgment of the supreme court of Puerto Rico which merely remands to a lower court for a new trial is not a final decision (1959) Pacific International Rice Mills, Inc. v. Fabregas & Co., Inc., (CA 1), 264 F(2d) 50.

As applicable to Puerto Rico, the phrase "final decisions" in this section means those decisions which, without strict regard to form, in fact fully and finally adjudicate rights and terminate litigation in such a way that further adjudication is precluded in the supreme court of Puerto Rico. (1962) Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 901 v. Editorial "El Imparcial," Inc., (CA 1), 300 F(2d) 125.

CHAPTER 83.—COURTS OF APPEALS

AMENDMENT NOTE

Act Aug. 30, 1961, P. L. 87-189, § 4, 75 Stat. 417, amended the analysis of this chapter by striking out item 1293.

CROSS REFERENCES

Procedure, generally, on appeal to the courts of appeals, see Federal Rules of Appellate Procedure, F.C.A. Court Rules, Part 2.

See, also, parts V and VI, generally of this title, relating to procedure and particular proceedings.

Section 1291. Final decisions of district courts.—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. (~~June 25, 1948,~~ c. 646, § 1, 62 Stat. 929; ~~Oct.~~ 31, 1951, c. 655, § 48, ~~65 Stat. 726~~; July 7, 1958, P. L. ~~85-508, § 12(e), 72 Stat. 348.~~)

Prior law.—This section is based on Act Mar. 3, 1911, c. 231, § 128, 36 Stat. 1133; Aug. 24, 1912, c. 390, § 9, 37 Stat. 565; Jan. 28, 1915, c. 22, § 2, 38 Stat. 803; Feb. 7, 1925, c. 150, 43 Stat. 813; Sept. 21, 1922, c. 370, § 3, 42 Stat. 1006; Feb. 13, 1925, c. 229, § 1, 43 Stat. 936; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; May 17, 1932, c. 190, 47 Stat. 158; Feb. 16, 1933, c. 91, § 8, 47 Stat. 817; May 31, 1935, c. 160, 49 Stat. 313; June 20, 1938, c. 526, 52 Stat. 779; Aug. 2, 1946, c. 753, Title IV, Part 3, § 412(a) (1), 60 Stat. 844 (§§ 225(a) and 933 (a) (1) of former Title 28, and § 1356 of Title 48).

Revision note.—This section rephrases and simplifies paragraphs "First," "Second," and "Third" of § 225(a) of former Title 28 which referred to each Territory and Possession separately, and to former §§ 61 and 62 of the Canal Zone Code, § 933(a) (1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of former § 1356 of Title 48 relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone. The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See § 451 of this title.) Paragraph "Fourth" of former § 225(a) is incorporated in § 1293 of this title. Words "Fifth. In the United States Court for China, in all cases" in

guilty of first degree murder arising under the local law. (1950) People of Virgin Islands v. Price, (CA 3), 181 F(2d) 394.

Court of appeals had jurisdiction of appeal from a final decision of the district court of the Virgin Islands rendered on an appeal from a decision of the municipal court, a court of inferior jurisdiction created by local law. (1963) Southerland v. St. Croix Taxicab Assn., (CA 3), 315 F(2d) 364.

The court of appeals of the ninth circuit had jurisdiction of an appeal from the appellate division of the district court of Guam. (1963) Corn v. Guam Coral Co., Inc., (CA 9), 318 F(2d) 622.

1292. Interlocutory decisions. — (a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (~~June 25, 1948, c. 646~~, § 1, 62 Stat. 929; Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; ~~July 7, 1958~~, P. L. 85-508, § ~~12(e)~~, 72 Stat. 348; Sept. 2, 1958, P. L. ~~85-919~~, 72 Stat. ~~1770~~.)

Prior law.—This section is based on Act Mar. 3, 1911, c. 231, §§ 128, 129, 36 Stat. 1133, 1134; Feb. 13, 1925, c. 229, § 1, 43 Stat. 937; Feb. 28, 1927, c. 228, 44 Stat. 1261; Apr. 3, 1926, c. 102, 44 Stat. 233; May 20, 1926, c. 347, § 13(a), 44 Stat. 587; Apr. 11, 1928, c. 354, § 1, 45 Stat. 422; May 17, 1932, c. 190, 47 Stat. 158 (§§ 225(b), 227, and 227a of former Title 28, § 1356 of Title 48).

Revision note.—Section consolidates sections cited with necessary changes in phraseology to effect the consolidation. The second paragraph of § 225(b) of former Title 28 relating to review of decisions of the district courts, under § 9 of the Railway Labor Act (§ 159 of Title 45) was omitted as covered by § 1291 of this title. Words in § 227 of former Title 28 "or decree," after "interlocutory order," were deleted, in view of Rule 65 of the Federal Rules of Civil Procedure, using only the word "order." Provisions of §§ 227 and 227a of former Title 28, relating to stay of proceedings pending appeal were omitted as superseded by Federal Rules of Civil Procedure, Rule 73. Provisions of § 227 of former Title 28 requiring an additional bond by the district court as a condition of appeal were omitted in view of Federal Rules of Civil Procedure, Rule 73. Words in § 227 of former Title 28 "and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein," at the end of the first sentence of § 227 of former Title 28 were deleted as fully covered by § 1254 of this title, applicable to any case in a court of appeals. Other procedural provisions of said § 227 were omitted as covered by § 2101 et seq. of this title. In subsec. (3) which is based on § 227a of former Title 28, words "civil actions" were substituted for "suits in equity" and word "judgments" was substituted for "decree," in view of Rules 2 and 54 of the Federal Rules of Civil Procedure. The provision of § 227a of former Title 28 that appeal must be taken within thirty days after entry of judgment is incorporated in § 2107 of this title. The provisions of § 227a of former Title 28 relating to stay of proceedings pending appeal were omitted as superseded by Rule 73 of the Federal Rules of Civil Procedure. The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States" by § 451 of this title; consequently the specific reference to "the United States district courts for Hawaii" was omitted. The District Court for the District of Puerto Rico was not enumerated in former § 225(b) nevertheless subsec. (2) of the revised section does not except such court in conformity with the last sentence of former § 864, Title 48, which is incorporated in §§ 41, 119, 133, and 1294 of this title. Section 61 of Title 7 of the Canal Zone Code is also incorporated in §§ 1292 and 1295 of this title.

Amendment notes.—Act Oct. 31, 1951, cited to text, inserted "the District Court of Guam," in subsec. (a)(1).

Act July 7, 1958, cited to text, deleted "the District Court for the Territory of Alaska," in subsec. (a)(1).

Act Sept. 2, 1958, cited to text, inserted "(a)" at the beginning of the section and added subsec. (b).

Cross references.—Procedure on appeal, see the Federal Rules of Appellate Procedure.

Time for appeal, see § 2107 of this title.

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Orders and decrees appealable.
3. —Injunctions.

The court could not set aside a judgment of conviction and grant a new trial after the expiration of the term. (1933) Fine v. U. S., (CCA 7), 67 F(2d) 591.

One judge could overrule the decision of another judge rendered on the same day where the first decision was without jurisdiction to sustain it. (1934) Universal Oil Products Co. v. Standard Oil Co., (DC-Mo), 6 FSupp 37.

In a suit in the nature of a bill of review to vacate a decree in an action previously brought against the alien property custodian, it had to be determined what evidence adduced at the trial was not available at the time the original suit was litigated. (1943) U. S. v. Irving Trust Co., (DC-NY), 49 FSupp 663.

107. Review.

When the only point raised in the trial court was that of jurisdiction, it was the only point that would be considered on appeal. (1838) M'Donald v. Smalley, 26 US(1 Pet) 620, 7 LEd 287.

After judgment, want of jurisdiction set up to avoid the same had to be shown with great certainty. (1885) Provident Savings Life Assurance Society v. Ford, 114 US 635, 29 LEd 261, 5 SCR 1104.

Mandamus would not lie to compel a district court to take jurisdiction of and proceed with a case which it had wrongfully remanded to the state court. (1890) In re Pennsylvania Co., 137 US 451, 34 LEd 738, 11 SCR 141.

Mandamus would lie to compel a district court to set aside its order of dismissal and take jurisdiction of a cause when the cause was cognizable by that court. (1893) In re Hohorst, 150 US 653, 37 LEd 1211, 14 SCR 221.

If the Supreme Court found that there was a want of jurisdiction, it would reverse the decree with instructions to the lower court to dismiss the bill for want of jurisdiction. (1903) Defiance Water Co. v. Defiance, 191 US 184, 48 LEd 140, 24 SCR 63; (1904) Newburyport Water Co. v. Newburyport, 193 US 561, 48 LEd 795, 24 SCR 553, rev'g (CC-Mass), 113 Fed 677.

When lack of jurisdiction of the subject matter affirmatively appeared upon the record, it was the duty of the appellate court to notice the same. (1912) Royal Ins. Co. v. Stoddard, (CCA 8), 201 Fed 915.

Decision of trial court that evidence failed to support plaintiff's allegations as to jurisdictional amount could not be set aside on appeal unless clearly erroneous. (1940) Kurn v. Beasley, (CCA 8), 109 F(2d) 687.

Court of appeals determined jurisdiction of court below though question was not raised by parties (1940) Jewell v. Cleveland Wrecking Co., (CCA 8), 111 F(2d) 305, rev'g 28 FSupp 366; (1940) Alexander v. Westgate-Greenland Oil Co., (CCA 9), 111 F(2d) 769.

1332. Diversity of citizenship—Amount in controversy—Costs.—(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. (~~June 25, 1948~~, c. 646, § 1, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. ~~658~~; July 25, 1958, P. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, P. L. ~~88-439, § 1, 78 Stat. 445~~.)

Prior law.—This section is based on Act Mar. 3, 1911, c. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, c. 283, § 1, 48 Stat. 775; Aug. 21, 1937, c. 726, § 1, 50 Stat. 738; Apr. 20, 1940, c. 117, 54 Stat. 143 (§ 41 (1) of former Title 28).

Revision note.—Other provisions of former paragraph (1) are incorporated in §§ 1331, 1341, 1342, 1345, 1354, and 1359 of this title. (See notes under said sections.) Jurisdiction conferred by other sections of this chapter, except § 1335, is not dependent upon diversity of citizenship. As to citizenship of bank where jurisdiction depends upon diversity of citizenship, see § 1348 of this title. Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" in order to conform to Rule 2 of the Federal Rules of Civil Procedure. Words "or citizens of the District of Columbia, Territory of Hawaii, or Alaska, and any State or Territory" which were inserted by the amendatory Act April 20, 1940, are omitted. The word "States" is defined in this section and enumeration of the references is unnecessary. The revised section conforms with the views of the United States Attorney for Puerto Rico, who observed that the Act of April 20, 1940 permitted action between a citizen of Hawaii and of Puerto Rico, but not between a citizen of New York and Puerto Rico, in the district court. This changes the law to insure uniformity. The 1940 amend-

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

CHAPTER 3

Appeal as of Right—How Taken

Rule 3. Appeal as of Right—How Taken

(a) FILING THE NOTICE OF APPEAL. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) JOINT OR CONSOLIDATED APPEALS. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) CONTENT OF THE NOTICE OF APPEAL. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) SERVICE OF THE NOTICE OF APPEAL. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and in criminal cases, habeas corpus proceedings, or proceedings under 28 U.S.C. § 2255, the clerk shall mail a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

SYNOPSIS OF CHAPTER 3

PART III

PLEADINGS AND MOTIONS

CHAPTER 7

Pleadings Allowed; Form of Motions

Rule 7. Pleadings Allowed; Form of Motions.

(a) PLEADINGS. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) MOTIONS AND OTHER PAPERS.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) DEMURRERS, PLEAS, ETC., ABOLISHED. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

SYNOPSIS OF CHAPTER 7

CHAPTER 8

[Recompiled in 1962 and supplemented in 1963 and 1967 by Prof. JAMES WM. MOORE, Sterling Professor of Law, Yale University, Prof. ALLAN D. VESTAL, Professor of Law, State University of Iowa, and HOWARD P. FINK, Esq., of the Connecticut and New York Bars, to reflect developments since date of original publication to 1962, the 1963 and 1966 amendments to the Official Forms that deal with pleading, and the 1966 amendment to Rule 8(e) (2).]

General Rules of Pleading

Rule 8. General Rules of Pleading.

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) DEFENSES; FORM OF DENIALS. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including aver-

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ments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) EFFECT OF FAILURE TO DENY. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) CONSTRUCTION OF PLEADINGS. All pleadings shall be so construed as to do substantial justice.

CHAPTER 10

Form of Pleadings

Rule 10. Form of Pleadings.

(a) CAPTION; NAMES OF PARTIES. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) PARAGRAPHS; SEPARATE STATEMENT. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) ADOPTION BY REFERENCE; EXHIBITS. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

SYNOPSIS OF CHAPTER 10

MOORE'S
FEDERAL PRACTICE
SECOND EDITION

VOLUME 3

THE FEDERAL RULES OF CIVIL PROCEDURE
for the
United States District Courts

PART III
PLEADINGS AND MOTIONS
Continued

CHAPTER 13
Counterclaim and Cross-Claim

[Recompiled in 1972, to reflect developments since date of original publication, by JAMES WM. MOORE, Sterling Professor of Law, Yale University, and JOHN E. KENNEDY, Professor of Law, Southern Methodist University.]

Rule 13. Counterclaim and Cross-Claim.

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject mater of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time

the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) PERMISSIVE COUNTERCLAIMS. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) COUNTERCLAIM EXCEEDING OPPOSING CLAIM. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) COUNTERCLAIM AGAINST THE UNITED STATES. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) OMITTED COUNTERCLAIM. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or

part of a claim asserted in the action against the cross-claimant.

(h) JOINDER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

SYNOPSIS OF CHAPTER 13

History

I. General Matters

CHAPTER 42

Consolidation; Separate Trials

[Recompiled in 1969, to reflect development since date of original publication, by JO DESHA LUCAS, professor of Law, University of Chicago Law School.]

Rule 42. Consolidation; Separate Trials.

(a) CONSOLIDATION. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

SYNOPSIS OF CHAPTER 42

CHAPTER 52

Findings by the Court

[Recompiled in 1969, to reflect development since date of original publication, by JO DESHA LUCAS, Professor of Law, University of Chicago Law School.]

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

[7]—Committee Note of 1946 to Amended Subdivision (g).

The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13(g).

[8]—Subdivision (h).

Subdivision (h), as originally promulgated in 1937, provided:

(h) ADDITIONAL PARTIES MAY BE BROUGHT IN. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

[8.—1]—1966 Amendment to Subdivision (h).

Subdivision (h) was rewritten in 1966 as follows (all of the original wording was deleted):

(h) JOINDER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

[8.—2]—Committee Note of 1966 to Amended Subdivision (h).

Rule 13(h), dealing with the joinder of additional parties to a counterclaim or cross-claim, has partaken of some of the textual difficulties of Rule 19 on necessary joinder of parties. See Advisory Committee's Note to Rule 19, as amended; cf. 3 *Moore's Federal Practice,* ¶13.39 (2d ed. 1963), and Supp. thereto; 1A Barron & Holtzoff, *Federal Practice and Procedure* § 399 (Wright ed. 1960). Rule 13(h) has also been inadequate in failing to call attention to the fact that a party pleading a counterclaim or cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied.

The amendment of Rule 13(h) supplies that latter omission by expressly referring to Rule 20, as amended, and also incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. Hereafter, for

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
- -x

UNITED MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

- against -

WILLIAM J. DAVENPORT, SALOMA DAVENPORT, his wife, WILLIAM WATTS, GRACE WATTS,

"JOHN DOE", "RICHARD ROE", "JAMES POE", and "BILLY BOW", the names of the last four defendants being fictitious, true names being unknown to plaintiff, intending thereby to designate tenants or occupants of the mortgaged premises.

Defendants.

- -x

ANSWER

Index No. 14120/70

SIRS:

The defendants William J. Davenport and Saloma Davenport appear herein by their attorney, GENE CRESCENZI, and answer the plaintiff's complaint as follows:

1. Defendants deny knowledge and information sufficient to form a belief as to the truth of paragraphs marked 'XIII', 'XIV', and 'XXII', of the complaint herein.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

2. Lack of jurisdiction in that the default of the defendants as alleged herein is a direct result of the Rent Control Laws of the City of New York, the execution of which operates against the defendants in a discriminatory and unequal manner and deny them due process of law and their civil and constitutional rights under the Fourteenth Amendment of the United States Constitution.

3. The said Rent Control Law has limited the income of the defendants and has not limited the income of the plaintiff mortgagees nor other suppliers of goods and services for the operation of the premises herein on a profit-making basis.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

4. Defendants William J. Davenport and Saloma Davenport are residents of the State of New Jersey and intend to remove this cause of action to the Federal Court of original jurisdiction based upon diversity of citizenship or other ground, as set forth in Title 28 U.S.C. section 1332, and Title 28 U.S.C. sections 1441 and 1443.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

5. The courts of the State of New York lack jurisdiction on the grounds that the Rent Control Law is a political law which the courts of the State of New York are bound to uphold as a matter of sovereignty notwithstanding the supervening civil and constitutional rights under Title 42 U.S.C. section 1983, the Fourteenth Amendment of the United States Constitution, Articles 55 and 56 of the United Nations Charter, and Articles 28 and 29 of the Charter of the Organization of American States.

AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE

6. Lack of jurisdiction of this court in that the Rent Control Statutes and the alleged mortgage herein impose a condition of involuntary servitude upon the defendants, who are black people, in violation of the Thirteenth Amendment and Fourteenth Amendment of the United States Constitution.

WHEREFORE, a judgment is demanded against the plaintiff dismissing the Complaint herein, together with the costs and disbursements of this action.

Dated: September 1, 1970.

Yours, etc.,

GENE CRESCENZI
Attorney for William J. Davenport
and Saloma Davenport, Defendants
Office & P. O. Address
415 Lexington Avenue
New York, N.Y. 10017
MU 2-1686

BEST COPY AVAILABLE

THE UNITED STATES DISTRICT COURT FOR THE SECOND SOUTHERN DISTRICT OF NEW YORK

United Mutual Life Insurance Co, Plaintiff

v.

70 CIV 3878

William J. Davenport, et al

To: The Honorable Constance B. Motley
United States District Judge

Re: Recievership in the above action, Pursuant to instruction of this court as of the hearing before this court August 17, 1971.

STATEMENT TO THE COURT Oct. 8, 1971 OF CONDITIONS OF THE RECIEVERSHIP.

1. Following the hearing and arrival therein of agreement by direction of the court, recievership of the property involved in this action reverted to owner William J. Davenport. An order so stating was to be prepared by Mr. David Dinkins, attny for plaintiff and submitted to the court for signature. With this appearance and accounting to follow. The order appears not to be existant as yet and the situation has deteriorated and become complicated requiring formal authorizations of this court for clarification. Which authorizations need extend beyond the presently promised order. The situation is this;

2. During the years 1955 through 1960 five apartments in the building (575 E. 168 St. - hereto involved.) by statutory preformance of section 2(2)(h) of the New York State Rent Control Law as amended 1954 were exempted from control, with official notice filed and approved by the New York State Commission.

3. During the years 1963 and 1964, the New York City Rent Administration ordered those statutory exemptions revoked in four instances and controlled rents restored without statement of charges as required by law, with the hearings required by law, without submission of charges to the courts for examination as required by law, and with claims that these existant exemptions were " applications under the New Laws and regulations promulgated in 1962".

4. For the intervening eight years defendant in this action William J. Davenport has sought both administrative and court opportunity to be heard in his own defense. In every instance he has been denied access to the record, information relative to the administrative action necessary to his complaint, and opportunity to be heard thereto by the courts . ALL IN CONSEQUENCE OF FRAUDULENT CLAIMS advanced by the New York City Rent Administrator as to his preformance of quasi-judiciary authority. Falsely claiming AS A STANDARD PROCEEDURE before the courts notice to defendant, proceedures of examination to determine fact, specifications of law, and prior findings of the courts which have in no instance actually occurred. DEFENDANT HERETO HAS THUS BEEN DENIED A HEARING IN WHICH FACTS WERE DETERMINED AND THE LAW STATED.

5. The courts have consistently dismissed the questions defendant has sought to raise without examination, without trial, and without providing plaintiff knowledge required to perfect his actions before the court on the erroneous premise that such provision had previously been made by the New York City Rent Administrator as required by law, and as claimed by him, but not actually preformed, and not in fact of record.

6. Thus NO DETERMINATION OF THE STATUS OF LAWFUL RENTS HAS BEEN MADE, but the New York City Rent Administrator has informed the tenants and the courts wrongly that the rents are controlled and at rates below operating costs.

7. For years and today therefore tenants have refused to pay due rents,

8. Further, several prior tenants have instituted claims nominally forbidden by law, in A[illegible] courts seeking and obtaining damages from defendant hereto for criminal actions stated by the New York City Rent Administration of landlord-owner-defendant-in-this-action, where no crime has occurred, no charge has been made, no opportunity to be heard in his defense has been accorded, and in fact the tenant has been the party to breach the law for which action he was assigned damages paid by the injurded landlord.

9. In consequance the services and building have deteriorated for lack of funds, causing violations to be effected and used as a basis for further action of the New York City Rent Administrator to claim re-control of the fifth apartment without notice to landlord-defendant hereto, and further reduce the ordered rents.

10. Presently in the building no tenant will pay the agreeded rent, only two are willing to pay any rent money to defendant-landlord-reciever-owner, and three apartments are occupied by squatters without authority who refuse to enter tenancy agreement or pay proper rents.

11. Therefore for the months of September and October, defendant -owner-reciever has been able to collect only two hundred forty seven dollars ($247.00) from the tenants. Which funds are held in account for use as required.

12. Defendant- owner - reciever has arranged for superintendant service, oil delivery and furnace maintainance of the property, but is limited by lack of funds.

13. Defendant - owner - reciever has also by letter inquired the status of funds collected by the Sherriff of the Bronx on court order of Garnishee which by order of this court were assigned to plaintiff in this action, no answer has been recieved. The actual whereabouts of the funds is unknown, but is believed to have been delivered by the Sherriff's office to Raymond Rubin subsequent to and contrary to the order of this court, which order was known to both the office of the Sherriff and the office of Raymond Rubin.

14. The situation is untenable without examination of the facts and a statement of the law by this court which will clarify the exempt or controlled status of the apartments and the rents due, and the authority of management.

15. Defendant therefore repeats his closing request of his motion of August 17, 1971,

> "10. Wherefore, defendant William Davenport further petitions this court to correct it's prior oversight and provide the authority of this court to extend to <u>ALL</u> questions which may be considered to be involved and/or underly this foreclosure action. Which to specify will include examination of the facts basic to the New York City Rent Administrator's Orders hereto involved. That the determination of this court may be based upon fact and law. .....".

16. Further, as of the date of this presentation, a series of motions and cross motions presently on the calendar of this court for the 12th and 19th of October, and by stipulation agreement on for the 19th en toto will bring most of these essentials before this court. Plaintiff again asks this court and this judge to accept assignment, examine this issue once throughly that the facts might for the first time be disclosed and recognized by the court, that the law might be stated and enforced. The actions remaining separate, but the court becoming therewith adequately informed.

Respectfully submitted

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Robert LaGrassa, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd. MASPETH, N.Y.C.

That on the 29th day of September, 1976, deponent personally served the within BRIEF OF PLAINTIFF-APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

WILLIAM J. DAVENPORT
Defendant-Appellant Pro Se
324 Allaire Ave.
Leonia, N. J. 07605

Robert LaGrassa

Sworn to before me this

29th day of September, 1976.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978